UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Warren B. Cook,
Appellant,

v. Vet. App. No. 15-0873

Robert A. McDonald,
Secretary of Veterans Affairs,
Appellee.

MR. COOK'S REPLY TO THE VA'S RESPONSE TO THIS COURT'S ORDER OF MARCH 7, 2016.

Mr. Cook submits the following reply to the Secretary's May 6, 2016 response to this Court's Match 7, 2016 Order. The Secretary interprets the relevant VA regulation as entitling claimants to a single hearing, with subsequent hearings being discretionary. VA's Response, p. 1. The Secretary incorrectly asserts that there is no basis in statute or regulation directing that a claimant must be provided more than one Board hearing on request. *Id.* The Secretary submits that: "All of the relevant statutes and regulations use the singular 'a' or 'an' when discussing Board hearings." *Id.*

In *Sursely v. Peake*, 551 F.3d 1351 (Fed. Cir. 2009), the Federal Circuit rejected a similar interpretation of the statute for an annual clothing allowance. The Federal Circuit concluded that the statute did not prohibit the award of multiple clothing

allowances. The right to a hearing is significantly more important that an annual clothing allowance.

The Secretary acknowledges that his reliance on this Court's decision in *Arneson v. Shinseki*, 24 Vet. App. 379, 385-86 (2011) is in fact not directly on point because this Court's analysis in *Arneson* concerned 38 U.S.C. § 7102 and the interpretation of 38 C.F.R. § 20.707. VA's Response, pp. 2-3 fn. 1. The pertinent statute in this case is 38 U.S.C. § 7107 and the pertinent regulation is 38 C.F.R. § 3.103(c). The Secretary has interpreted both the statute and the regulation in the narrowest possible way and not in the light most favorable to claimants. Further, the Secretary reads into the statute discretion which does not exist in either the statute or the regulation. The right to a hearing is mandatory and not discretionary.

The Secretary's argument relies on the presence in the statute of the article "a" preceding the word "hearing" to either create ambiguity or the need to fill a gap. The statute is neither ambiguous nor requires any gap filling. The Supreme Court has long recognized the "canon [of statutory construction] that provisions for benefits to members of the armed services are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (*Citing Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, 285 (1946)). Even if Congress's use of the article "a" before the word "hearing" has created some interpretative doubt for this Court, the that "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513

U.S. 115, at 117-118 (1994); *see Shinseki v. Sanders*, 129 S. Ct. 1696 at 1707 (2009) ("(W)e recognize that Congress has expressed special solicitude for the veterans' cause."); *id.* at 1709 (Souter, J., dissenting) (noting "Congress's understandable decision to place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions"). The Secretary's interpretation of the provisions of 38 U.S.C. § 7107 places his thumb on the scale in favor of efficiency and not in the veteran's favor.

Mr. Cooks agrees that this Court reviews *de novo* the legal question whether the intent of Congress is unambiguously expressed in a statute, or whether Congress left a gap for VA to fill. Statutory interpretation is a holistic endeavor that requires consideration of a statutory scheme in its entirety. *Meeks v. West*, 216 F.3d 1363, 1367 (Fed. Cir 2000). *See United States Nat. Bank of Oregon v. Independent Ins. Agents of Am., Inc.,* 508 U.S. 439, 454-455 (1993). "[A] statute is to be construed in a way which gives meaning and effect to all of its parts," *Saunders v. Secretary of the Dep't of Health & Human Servs.,* 25 F.3d 1031, 1035 (Fed. Cir.1994), and the Supreme Court has repeatedly stressed that "[i]n expounding a statute, we [must] not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Massachusetts v. Morash,* 490 U.S. 107, 115 (1989). The Secretary asks this Court to be guided by Congress's use of the article "a" which precedes the word "hearing" and ignore the provisions of the whole law, and to its

object and policy. The object and the policy articulated by Congress in § 7107 is the right of a claimant to a hearing. The Secretary creates ambiguity where there is none and envisions a gap where none exists. *See Gardner v. Derwinski*, 1 Vet. App. 584, 586-587 (1991) ("Determining a statute's plain meaning requires examining the specific language at issue and the overall structure of the statute." (citing *Bethesda Hosp. Ass'n v. Bowen,* 485 U.S. 399, 403-405 1988))), *aff'd sub nom. Gardner v. Brown,* 5 F.3d 1456 (Fed. Cir.1993), *aff'd,* 513 U.S. 115.

The Secretary is entitled to no deference to its interpretation of its regulation at 38 C.F.R. § 3.103(c) under *Chevron v. Nat'l Resources Def. Council, Inc.*, 467 U.S. 837, 842–843 (1984) because the language at issue in the case, the meaning of the use of an article "a" before the word "hearing" is controlled by this Court's interpretation of the intent of Congress when it used an article "a" before the word "hearing" in the provisions of 38 U.S.C. § 7107. *Chevron* deference is not for application.

As correctly noted by the Secretary in his response:

> The canons of statutory construction apply with similar force to agency regulations and require interpretation of words in their context with an eye to the law as a whole. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, 112 S. Ct. 570, 116 L. Ed.2d 578 (1991) (holding that, when interpreting a statute or regulation, courts must read the provisions of the law as a whole and in context); *Imazio Nursery, Inc. v. Dania Greenhouses*, 69 F.3d 1560, 1564 (Fed. Cir. 1995)(holding that all parts of a statute must be construed together without according undue importance to a single or isolated portion) . . ..

VA's Response. p. 9. In this case, an article "a" before the word "hearing" does appear in both the statute and the regulation.

The question for this Court is whether when these provisions of the law are read as a whole and in context they mean as the Secretary has interpreted them or do they mean as Mr. Cook interprets them. The interpretation of the Secretary is to narrow and favors the efficiency issues of the Secretary. The interpretation of Mr. Cook favors claimants and is consistent with the plain meaning of both the statute and the regulation when read as a whole and in context. Mr. Cook's interpretation is consistent with the nonadversarial veteran friendly nature of the statutory scheme created by Congress.

This matter comes down to whether Congress intended claimants whose cases are recycled back and forth to the Board following remands from both the Board and this Court to have been entitled to **only** one hearing. And, any other hearing would be discretionary. Such an interpretation transforms the unambiguous intent of Congress to create a right to a hearing to a right to **only** one hearing. A right to a hearing is not subject to the discretion of the Secretary.

Mr. Cook's interpretation does not lead to an absurd result. To the contrary, Mr. Cook's interpretation is predicated on the reality that following remands from both the Board and this Court new issues are raised and the need for another hearing is just as important as the need for the hearing previously held. The Secretary's

interpretation ignores the impact of remands. When an appeal is returned to the Board whether following its own remand or following judicial review and remand the right to a hearing under both statute and regulation is the same as when the appeal first comes to the Board. The Secretary's effort to dilute a clamant's right to a hearing before every Board decision must be rejected by this Court.

The Secretary's attempt to create a dependent right to a hearing based on his unfettered discretion stands at odds with both a claimant's right to hearing based on statute and regulation as well as the claimant's constitutional right to hearing. The fatal flaw in the Secretary's position is that a claimant's right to a hearing can be limited by making the right to a hearing subject to the discretion of the Secretary. Such a conversion of a right extinguishes the right because there is no longer the right to hearing. The right to a hearing was created by Congress in § 7107 and interpreted by the Secretary in § 3.103(c).

The Secretary's interpretation overlooks pertinent portions of the statute and regulation. By statute Congress provides that: "The Board shall decide any appeal only after affording the appellant an opportunity for a hearing." *See* 38 U.S.C. § 7104(b). When the Board affords a hearing but remands, the Board **did not** decide the appeal. When the appeal returns to the Board the plain language of § 7104(b) clearly states that the Board shall decide any appeal only after affording the appellant an opportunity for a hearing. Likewise, if the claimant's appeal is remanded by this

Court, it does so only after vacating the Board's decision and ordering readjudication. Thus, the Board must decide the claimant's appeal, anew, and in accordance with of § 7104(b) which mandates that the Board shall decide any appeal only after affording the appellant an opportunity for a hearing.

Additionally, the VA by regulation provides that: "Upon request, a claimant is entitled to a hearing at any time on any issue involved in a claim . . . ." *See* 38 C.F.R. § 3.103(c)(1). The plain language and meaning of § 3.103(c)(1) which uses the phrase "at any time on any issue involved in a claim," contrary to the Secretary's interpretation, must be interpreted to require another hearing "at any time on any issue" when the appeal is returned to the Board from the regional office or the Court.

The Secretary claims that Mr. Cook's interpretation would:

> . . . would throw a massive wrench into a system that is already backlogged, and severely hamper the Board's ability to fairly manage its docket with economy of time and effort.

VA's Response, p. 14. This claim, like the Secretary's interpretation ignores the unambiguous intent of Congress. As the Federal Circuit noted in *Gardner*, "Many VA regulations have aged nicely simply because Congress took so long to provide for judicial review." *Gardner v. Brown*, 5 F.3d 1456, 1463 (1993). The interpretation of the Secretary is simply not supported by the unambiguous intent of Congress and the plain meaning of § 3.103(c)(1).

Respectfully submitted by:

/s/ Kenneth M. Carpenter
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Warren B. Cook
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